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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY RAUL MESA,

Defendant and Appellant.

B284218

(Los Angeles County
Super. Ct. No. BA451702)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed and remanded with instructions.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Raul Mesa appeals from a judgment entered after a jury convicted him of discharging a firearm with gross negligence, possessing a firearm as a felon, and possessing ammunition by a person prohibited from possessing a firearm. As to all counts, the jury found true the special allegation the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1)(A), (B).)¹ Mesa contends on appeal his trial attorney provided ineffective assistance of counsel by failing to object to inadmissible hearsay testimony from the People's gang expert. Mesa further asserts there was insufficient evidence to support the jury's true finding on the gang enhancement.

Mesa also contends, the People concede, and we agree remand is necessary to allow the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amended sections 667 and 1385, effective January 1, 2019, whether to strike the prior serious felony conviction enhancements the trial court imposed pursuant to section 667, subdivision (a)(1).

We affirm the conviction, but remand for the trial court to exercise its discretion whether to impose the sentence enhancements for Mesa's prior serious felony convictions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The information charged Mesa with assault with a firearm upon a police officer or firefighter (§ 245, subd. (d)(1); count 1),

¹ All further statutory references are to the Penal Code.

discharge of a firearm with gross negligence (§ 246.3, subd. (a); count 2), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3), and possession of ammunition by someone prohibited from possessing a firearm (§ 30305, subd. (a)(1); count 4). The information alleged as to all counts Mesa committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A), (B).) The information further alleged as to count 1 Mesa personally used a firearm (§§ 12022.5, subds. (a), (d), 12022.53, subd. (b)).

The information also alleged Mesa suffered two prior convictions for a violent or serious felony under the three strikes law (§§ 667, subds. (b)-(j), 1170.12); one prior serious felony conviction within the meaning of section 667, subdivision (a); and two prior felony convictions for which he served separate prison terms within the meaning of section 667.5, subdivision (b).

Mesa pleaded not guilty and denied the special allegations.

B. *The Evidence at Trial*

1. *The prosecution case*

(a) The shooting

At approximately 8:30 a.m. on November 9, 2016 Sonia Ortiz was waiting at a bus stop at the intersection of Rampart Boulevard and Sixth Street. She saw three men yelling at Mesa as they ran toward him. Mesa was walking, but stopped briefly approximately three to four feet in front of Ortiz. He yelled, “I come back,” or “I’m coming back” to the men who were chasing him. Mesa looked worried and agitated. Ortiz thought the three men were gang members because two of them had tattoos and

someone standing at the bus stop told her the men were local gang members. Ortiz also believed two of the three men had guns because they had their hands in their pockets “like they were carrying something.”

The three men continued chasing Mesa and got as close as 20 feet from him. Mesa crossed the street, but before the three men crossed after him, Mesa appeared to grab something from his pocket. Ortiz then heard a single gunshot and saw Mesa holding a gun with both hands clasped together, arms-length in front of his body, at about head or chest level. Ortiz did not see which direction the barrel of the gun was facing, but believed Mesa shot the gun in the air because no one was struck by the bullet. The three men turned around and ran away, and Mesa continued walking in the opposite direction.

At the time of the gunshot, three to four other people were waiting at the bus stop; people were walking around near the stores; a man was walking his dog; and cars were driving by in both directions. Ortiz called 911 to report the gunshot.

That morning Carlos Gomez was in his car, stopped at a traffic light at the corner of Sixth Street and Coronado Street, near Rampart Boulevard. Gomez saw Mesa walking on the sidewalk with his right hand under his shirt. Mesa crossed Coronado Street, turned around, pulled out a black revolver, and fired it once. Two “gang-member looking guys” were walking quickly behind Mesa at the time Mesa fired the shot, and Mesa fired the gun toward them. Mesa said something when he fired the shot, but Gomez could not understand what he said. Gomez believed Mesa fired the weapon at the men to stop them from coming after him. Mesa was wearing a short-sleeved shirt and looked “like a gang member.”

Gomez pulled his car to the side of the road and used his cell phone to record Mesa putting his gun away and fleeing. Gomez continued driving until he found two police officers in a patrol vehicle. He told the officers what he had seen and showed them the video on his cell phone.

(b) The police officer's pursuit

At approximately 8:50 that morning Los Angeles Police Officer Abel Munoz responded to a dispatch call of a shooting in progress. The dispatch call described the suspect as male, white, very tall, with tattoos, wearing a blue-and-white-striped shirt. Officer Munoz saw Mesa, who matched the description, approximately two blocks from the shooting; Officer Munoz observed Mesa's visible tattoos. He made eye contact with Mesa, exited his police vehicle, drew his gun, and ordered Mesa to stop and put his hands up. Mesa reached for the front of his waistband and began running toward the steps of an apartment complex. He could not get in, so he stopped and hid, then started running again. Office Munoz chased Mesa into a parking lot, where Mesa tossed his handgun over the fence. Shortly thereafter Officer Munoz caught up with Mesa, and two other police officers arrested him.

Officer Munoz returned to where Mesa had tossed the gun and recovered a blue steel revolver with a dark brown grip. The parties stipulated the revolver contained four live bullets, and there were two bullets that had been discharged. Ortiz and Gomez both identified Mesa as the shooter at field showups later that day.

(c) The gang expert testimony

Los Angeles Police Officer Paul Cruz testified as a gang expert.² He stated the Temple Street gang's claimed territory is bordered by Sunset Boulevard to the north, Alvarado Street to the east, Hoover Street to the west, and Third Street to the south. The gang has several rival gangs in the area bordering its territory, including Mara Salvatrucha (MS-13). MS-13 claims its territory in the area around Rampart Boulevard and Sixth Street. MS-13 is a "well established" gang with 8,000 to 10,000 members in the Los Angeles area who are capable of committing assault and murder.

Aspiring members of Temple Street will "put in work" for the gang by committing visible crimes to prove their commitment to the gang, including vandalism, robbery, and assault with a deadly weapon. Respect is paramount in gang culture, and a gang member loses respect by failing to defend the gang's territory from rival gangs. Gang members arm themselves before entering a rival gang's territory. Tattoos play a significant role in gang culture, and gang members get tattoos to show allegiance to their gang. If someone who is not a gang member gets a gang tattoo, there would be "violent consequences" for that person.

Officer Cruz testified Mesa was a member of the Temple Street gang based on four factors. First, Officer Cruz "spoke to officers that have arrested [Mesa] in the past that [Mesa] self-admitted his gang allegiance to." Next, Officer Cruz described Mesa's gang tattoos, including "Temple" on his right arm, "TST," which is short for "Temple Street," on his left arm and neck, and

² The parties stipulated Temple Street was a criminal street gang within the meaning of section 186.22 and Mesa was a convicted felon.

“Temple” and “T’s Up” on his stomach. Officer Cruz also relied on several photographs he had seen of Mesa associating with other gang members and displaying gang signs. Finally, he testified Mesa’s moniker was “Dino,” and gang members commonly use monikers to hide their identity from police.

In response to a hypothetical mirroring the facts of the case, which assumed the perpetrator was a Temple Street gang member, Officer Cruz testified the crimes the perpetrator committed—gross negligent discharge of a firearm, felon in possession of a firearm, and felon in possession of ammunition—were committed for the benefit of the gang, with the specific intent to promote and assist gang members. Officer Cruz added during cross-examination that the crimes “further[ed] the gang.” Officer Cruz explained those crimes create an atmosphere of intimidation and fear in the community and dissuade potential victims and witnesses from coming forward, which then allows the gang to commit crimes freely. Officer Cruz opined, under the facts of the hypothetical, the crimes enhance the gang member’s status within the gang by showing he was not afraid to enter a rival gang’s territory and discharge a firearm. Further, even if the gang member fires his weapon in self-defense, it benefits the gang because the person observing the crime will not know the circumstances and will still be afraid to come forward. A gang member acting alone can still benefit the gang because “word spreads like wildfire” in the community, and the gang member himself may brag about his crimes.

If a gang member is chased by rival gang members and does not fire a gun or fight back, other members of his gang will assume he “is not down anymore, or he’s just afraid.” If that were to happen, either the gang member would have to prove

himself again to the gang by conducting additional crimes or “get beat up pretty bad” and ousted from the gang.

2. *Defense evidence*

Defense investigator Jesse Bazan interviewed Gomez several weeks before trial. Gomez told him two “cholos” or “gangster types” were following Mesa on the day of the shooting, and that Mesa appeared to be scared. Mesa fired one shot at them and ran away.

C. *Closing Argument*

During his closing argument, Mesa’s attorney argued Mesa acted in self-defense in discharging his firearm after three gang members from MS-13 armed with firearms chased him. Mesa’s attorney argued, “We also know from their own witness, Cruz, that this MS-13 gang has the potential to kill other people, kill rival gang members. . . . They’re there to hurt, maim, or kill. That is their purpose, especially in their own territory. And they’ll do it just for Mr. Mesa even stepping foot into their territory. That would be enough for them to act violently. And that’s why they’re running him out. [¶] . . . They can’t let somebody that they perceive to be a rival gang [member] come into their territory. They’ve got to get them out, and they’re going to use force, if necessary. So the bottom line is, the shot that came from Mr. Mesa was done in self-defense.”

D. *The Verdicts and Sentencing*

The trial court granted Mesa’s motion for a judgment of acquittal as to count 1 (§ 1118.1). The jury found Mesa guilty on counts 2, 3, and 4, and the gang allegation true as to all counts.

Mesa admitted he suffered two prior strike convictions, two prior serious felony convictions, and two prior prison terms.

The trial court exercised its discretion to strike one of Mesa's prior strike convictions. On count 2 the trial court sentenced Mesa to the upper term of three years, doubled under the three strikes law, plus five years for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(B). On count 3 the trial court sentenced Mesa to a consecutive term of 16 months (one-third the middle term, doubled).³ On count 4 the trial court stayed a four-year sentence (the middle term of two years, doubled) under section 654. The court imposed two 5-year terms for the prior serious felony convictions, plus one year for one of the prior prison term enhancements.⁴ The trial court sentenced Mesa to an aggregate term of 23 years four months.

Mesa timely appealed.

³ During sentencing, the trial court did not address the gang enhancements the jury found true on counts 3 and 4. On remand, the court should confirm it is striking the enhancements on those counts.

⁴ Although the trial court orally calculated the aggregate sentence as 24 years four months, including two prior prison term enhancements, the minute order and abstract of judgment correctly reflect an aggregate sentence of 23 years four months. Because one of the prior prison term enhancements was based on the same prior conviction as one of the prior serious felony enhancements, the court could only impose one prior prison term enhancement. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1151.)

DISCUSSION

A. *Mesa Cannot Prevail on His Claim for Ineffective Assistance of Counsel*

1. *Officer Cruz's testimony included inadmissible hearsay*

Mesa contends, the People concede, and we agree Officer Cruz's testimony that other officers told him Mesa admitted his gang membership was inadmissible hearsay. The California Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) held an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) ". . . *Sanchez* drew a distinction between 'an expert's testimony regarding his general knowledge in his field or expertise,' and 'case-specific facts about which the expert has no independent knowledge.'" (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 408.) "The former is not barred by the hearsay rule, . . . while the latter is." (*Ibid.*)

A gang expert may not testify to a defendant's admissions of gang membership if the expert does not have personal knowledge of those admissions. (*Sanchez, supra*, 63 Cal.4th at pp. 672, 674-675, 685 [expert's testimony about statements defendant made to other police officers inadmissible hearsay].) However, "an expert may still rely on general "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is relevant to the "gang's

history and general operations.” [Citation.] This plainly includes the general background testimony [the expert officer] gave about [the gang’s] operations, primary activities, and pattern of criminal activities, which was unrelated to defendants or the current [crimes] and mirrored the background testimony the expert gave in *Sanchez*.” (*People v. Vega-Robles, supra*, 9 Cal.App.5th at p. 411 [testimony about history and founding of gang was admissible under *Sanchez* as background information].)

Officer Cruz’s testimony that police officers told him Mesa had admitted his gang affiliation was therefore inadmissible hearsay under *Sanchez*. But Officer Cruz’s other testimony about Mesa’s gang tattoos shown in photographs, Mesa displaying gang signs with other Temple Street gang members (in admitted photographs), and Mesa’s gang moniker did not run afoul of *Sanchez*’s prohibition. (See *People v. Garton* (2018) 4 Cal.5th 485, 506 [photographs and competent testimony based on photographs are not hearsay]; *Sanchez, supra*, 63 Cal.4th at p. 677 [expert may testify about tattoo shown in authenticated photograph and background information on meaning of tattoo].)

As Mesa concedes, he forfeited his objection to Officer Cruz’s hearsay testimony by failing to object to its admission at trial. (*People v. Stevens* (2015) 62 Cal.4th 325, 333 [“the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was improperly admitted”]; Evid. Code, § 353, subd. (a) [judgment may not be reversed based on erroneous admission of evidence unless there is “an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion”].) Mesa contends his trial attorney provided ineffective assistance of counsel under

Strickland v. Washington (1984) 466 U.S. 668, 687-692
(*Strickland*) by failing to object to Officer Cruz's hearsay
testimony at trial.⁵

⁵ Mesa contends Officer Cruz's hearsay testimony was also testimonial and therefore violated his Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36. However, because Mesa did not object to the testimony at trial, the record does not reflect whether the statements by Mesa to the police officers and the officers to Cruz were made in a context that renders them testimonial hearsay. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 585 [because record was not developed, appellate court could not determine whether statements by gang members were made during informal interactions with police officers, and thus would not be testimonial]; *People v. Valadez* (2013) 220 Cal.App.4th 16, 36 [statements from gang members to police officers not testimonial where information used as part of general community policing responsibilities].) We need not decide whether the statements were testimonial because even if they were, we would still apply the standard for ineffective assistance of counsel set forth in *Strickland, supra*, 466 U.S. at pages 687 to 692. (*Id.* at p. 697 ["[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."]; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008 ["had [defendant] not forfeited his direct claim of [constitutional] error, we would review whether any such error was harmless under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24" rather than the standard set forth in *Strickland*].)

2. *Applicable law on ineffective assistance of counsel*

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show (1) his or her ““counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms”” and (2) he or she ““suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.”” (*People v. Johnson* (2016) 62 Cal.4th 600, 653; accord, *People v. Mickel* (2016) 2 Cal.5th 181, 198; *Strickland*, *supra*, 466 U.S. at pp. 687-692.)

““[I]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.”” (*People v. Johnson*, *supra*, 62 Cal.4th at p. 653; accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 928.) “Moreover, we begin with the presumption that counsel’s actions fall within the broad range of reasonableness, and afford ‘great deference to counsel’s tactical decisions.’ [Citation.] Accordingly, we have characterized defendant’s burden as ‘difficult to carry on direct appeal,’ as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ““no rational tactical purpose”” for an action or omission.” (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198.)

3. *Mesa has not met his burden to show ineffective assistance of counsel*

Contrary to Mesa’s contention there can be “no legitimate reason” for his attorney’s decision not to object to Officer Cruz’s

hearsay testimony, as the People point out, the evidence Mesa was a gang member was helpful to his attorney's argument Mesa acted in self-defense. Indeed, in his closing argument Mesa's attorney asserted several armed and dangerous MS-13 gang members were chasing Mesa and would have harmed or killed him if Mesa did not fire a gun to scare them away. He explained, "[The MS-13 gang members] can't let somebody that they perceive to be a rival gang [member] come into their territory. They've got to get them out, and they're going to use force, if necessary." Absent Officer Cruz's testimony Mesa was a gang member, there was no basis for arguing the MS-13 gang members had to chase Mesa away because he was in rival gang territory, causing him to fire his gun in self-defense. While it is true, as Mesa contends, that gang membership was not necessary for his self-defense claim, Mesa's membership in a rival gang supported his theory he was protecting himself from rival gang members who wanted to chase him out of their territory.

The cases relied on by Mesa are distinguishable. In each case there was evidence the attorney did not make a tactical decision or there was no reasonable explanation for the attorney's inaction. (See *In re Hernandez* (2006) 143 Cal.App.4th 459, 470-471 [defense attorney signed declaration stating he "had no tactical reason for not objecting to the testimony" (italics omitted)]; *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104 [defense counsel failed to object to hearsay statements that were "the most compelling evidence to support an element of the offense"]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523-1524 [defense attorney failed to object to improper impeachment of defense witnesses where case turned entirely on "credibility

contest between the witnesses for the prosecution and the defense”].)

Moreover, even if Mesa could meet the first prong of the test for ineffective assistance of counsel, he cannot meet his burden to show he ““suffered prejudice . . . sufficient to undermine confidence in the outcome.”” (*People v. Johnson, supra*, 62 Cal.4th at p. 653.) Officer Cruz relied on four factors to support his opinion Mesa was a gang member, only one of which Mesa contends was inadmissible hearsay. The People admitted several photographs of Mesa’s tattoos, which Officer Cruz testified were gang tattoos. Officer Cruz also testified he viewed a photograph of Mesa displaying gang signs with known Temple Street gang members. Finally, he testified he knew Mesa’s moniker was “Dino” and explained gang members commonly used monikers to avoid police detection. Further, as we discuss below, there is ample evidence other than Mesa’s gang membership that Mesa committed the underlying crimes for the benefit of Temple Street gang, with the specific intent to promote, further, or assist the gang’s criminal conduct.

B. *Substantial Evidence Supports the Jury’s True Finding on the Gang Enhancement*

1. *Standard of review*

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the

judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*); accord, *People v. Perez* (2017) 18 Cal.App.5th 598, 607 (*Perez*) [“We review the entire record in search of reasonable and credible evidence of solid value, viewing all the evidence in the light most favorable to the prosecution, and drawing all reasonable inferences in favor of the jury’s findings.”].)

2. *Applicable Law*

To prove the gang enhancement, the prosecution must prove both prongs of the enhancement under section 186.22, subdivision (b)(1). (*Perez, supra*, 18 Cal.App.5th at p. 606; *People v. Rios* (2013) 222 Cal.App.4th 542, 561 (*Rios*).) “First, the prosecution is required to prove that the underlying felonies were “committed for the benefit of, at the direction of, or in association with any criminal street gang.” [Citation.] Second, there must be evidence that the crimes were committed “with the specific intent to promote, further, or assist in any criminal conduct by gang members.”” (*Perez*, at pp. 606-607, quoting *Rios*, at p. 561.)

“Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; accord, *Perez, supra*, 18 Cal.App.5th at p. 608.) Further, “[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference

that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1).”

(*Albillar, supra*, 51 Cal.4th at p. 63; accord, *Perez*, at p. 608.)

However, expert gang testimony cannot be “purely conclusory and factually unsupported.” (*People v. Ramirez* (2016)

244 Cal.App.4th 800, 819-820; accord, *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [an “expert’s opinion may not be based ‘on assumptions of fact without evidentiary support’”].)

As to the second prong that the defendant committed the underlying offenses with the specific intent to further, promote, or assist in the criminal activity of that gang, “[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.”” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 949, quoting *Rios, supra*, 222 Cal.App.4th at pp. 567-568.) “For this reason, ‘we routinely draw inferences about intent from the predictable results of action.’” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412.) “While a gang expert is prohibited from opining on a defendant’s specific intent when committing a crime, the prosecution can ask hypothetical questions based on the evidence presented to the jury . . . whether the hypothetical perpetrator harbored the requisite specific intent.” (*Perez, supra*, 18 Cal.App.5th at p. 607.) Specific intent may also be inferred where a gang member commits a crime to intimidate “rival gang members and neighborhood residents, thus facilitating future crimes committed by himself and his fellow gang members.” (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353.)

The specific intent prong may be met where the defendant acts alone. (*Rios, supra*, 222 Cal.App.4th at p. 564 [“section 186.22(b)(1) gang enhancement may be applied to a lone actor”];

People v. Morales (2003) 112 Cal.App.4th 1176, 1198 [“the typical close case is one in which one gang member, acting alone, commits a crime”]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931 [gang member acting alone intended to benefit gang by selling drugs where he had permission from gang to sell drugs in gang territory].)

However, when a gang member acts alone, expert testimony the gang member intended to benefit the gang, in the absence of underlying facts to support the opinion, is insufficient to prove the specific intent prong of the gang enhancement. (*Rios, supra*, 222 Cal.App.4th at p. 575 [evidence not sufficient to prove specific intent prong based solely on fact defendant was a gang member who possessed a gun in a stolen vehicle]; *Perez, supra*, 18 Cal.App.5th at p. 614 [evidence gang member with tattoos shot students at party insufficient to show specific intent]; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 663, 665 [insufficient evidence of specific intent where gang member committed carjacking alone and expert testimony alone connected the crime to the gang].)

3. *There was substantial evidence Mesa committed the underlying crimes for the benefit of the Temple Street gang with the specific intent to promote, further, or assist crimes by Temple Street gang members*

Mesa contends Officer Cruz’s testimony does not support both prongs necessary for a true finding on the gang enhancement. We conclude substantial evidence supports the gang enhancement.

As to the first prong, there was substantial evidence Mesa committed the underlying crimes for the benefit of the Temple

Street gang. As discussed, there was ample evidence Mesa was a Temple Street gang member, including his gang tattoos, his displaying gang signs in a photograph with other gang members, and his use of a gang moniker. Further, the underlying crimes were committed in a manner showing the crimes benefitted Temple Street gang members. According to Officer Cruz, the crime was committed in territory claimed by one of Temple Street's rival gangs, MS-13. Mesa entered the rival gang's territory armed with a loaded firearm, "prepared" for a potential confrontation.

Further, the men chasing Mesa were gang members, and two were armed. A person waiting at the bus stop told Ortiz the men were local gang members. Ortiz testified the men looked like gang members based on their tattoos, and Gomez described them as "gang-member looking guys." Ortiz believed the men were armed because she saw them walk with their hands in their pockets "like they were carrying something." Mesa threatened the rival gang members he would return and shot at them in broad daylight, as people walked, drove, and waited at bus stops. It was after the armed rival gang members yelled at Mesa and chased him that Mesa yelled he would return and fired his gun at the men.

Officer Cruz testified that when gang members commit crimes publicly, they create an atmosphere of intimidation and fear in the community, which benefits the gang by dissuading victims and witnesses from coming forward. Further, carrying a loaded firearm and discharging it in rival gang territory enhances this atmosphere of fear. By contrast, failure to fight back against rival gang members tarnishes the reputation of the individual gang member and the gang.

Mesa points to the facts of *Perez, supra*, 18 Cal.App.5th 598 to support his contention there was insufficient evidence he committed the underlying crimes to benefit the Temple Street gang. *Perez* is distinguishable. There, the “only shred of evidence” connecting the shooting to the gang was that the defendant was a tattooed, validated gang member. (*Id.* at p. 609.) The defendant was at a party of college students at which he unexpectedly encountered a conflict between several students and his female friend, leading him to shoot several of the students. (*Id.* at pp. 602-605.) There was no evidence anyone at the party other than the defendant had gang ties, anyone shouted a gang name or displayed a gang sign, or wore gang colors. (*Id.* at p. 609.) The defendant’s visible tattoos were not gang-related. (*Ibid.*) The court rejected the “sweeping generalization” of the gang expert that “any shooting by a gang member is gang related because the use of violence enhances the gang member’s reputation, and . . . instill[s] fear in the community,” as “untethered” from the specific evidence in the case. (*Id.* at p. 610.)

By contrast, Mesa entered a rival gang’s territory with visible gang tattoos (as described in the dispatch call and observed by Officer Munoz) and armed with a loaded firearm. Rival gang members chased Mesa out of their gang’s territory. Mesa threatened the rival gang members he would return and then fired a gun in their direction. This was not just “any shooting by a gang member” (*Perez, supra*, 18 Cal.App.5th at p. 610), but a very public shooting involving a territorial dispute between rival gangs.

The same facts supporting the first prong provide substantial evidence Mesa had the specific intent to promote,

further, or assist future criminal conduct by members of his gang. A reasonable jury could infer, based on Mesa's public and brazen discharge of a firearm toward rival gang members in their territory, that he "intended for the [crimes] to have the predicted effect of intimidating rival gang members and neighborhood residents, thus facilitating future crimes committed by himself and his fellow gang members." (*People v. Vazquez, supra*, 178 Cal.App.4th at p. 353.)

The other cases cited by Mesa in which the evidence was found insufficient to support the gang enhancement are also distinguishable because in none of the cases was there evidence tying the conduct to a gang. (See *People v. Franklin, supra*, 248 Cal.App.4th at p. 950 [insufficient evidence where crime of false imprisonment was carried out in both gang and non-gang territory and defendant's fellow gang members were unaware of the crime]; *People v. Ramirez, supra*, 244 Cal.App.4th at p. 819 [insufficient evidence where no gang signs were displayed, no gang names called out, and no gang attire worn, nor other evidence tying dispute to gang]; *Rios, supra*, 222 Cal.App.4th at p. 574 [insufficient evidence where there was no evidence defendant was in his own or rival gang territory, victims were rival gang members, or rival gang members saw defendant's gang tattoos]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [insufficient evidence where only gang evidence was that two members of same gang possessed a firearm in their gang's territory]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [insufficient evidence where there was no evidence defendant carrying a gun was in gang territory or planned to use gun in gang-related offense].)

C. *Remand for Resentencing Is Necessary Pursuant to Section 667, Subdivision (a)*

Mesa contends, the People concede,⁶ and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the prior serious felony conviction enhancements pursuant to section 667, subdivision (a).

In 2018 the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019. Senate Bill No. 1393 amended section 1385 by deleting subdivision (b), which prohibited trial courts from exercising discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667.” (§ 1385, former subd. (b).) Senate Bill No. 1393 applies retroactively to Mesa because Mesa’s sentence was not final at the time the new law became effective on January 1, 2019. (See *People v. Jones* (2019) 32 Cal.App.5th 267, 272 [Sen. Bill No. 1393 applied retroactively]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [same]; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [Absent contrary legislative intent, “[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.”].)

⁶ The People conceded remand would be appropriate if Martinez’s conviction did not become final by Senate Bill No. 1393’s effective date of January 1, 2019.

DISPOSITION

The judgment of conviction is affirmed. We remand with directions for the trial court to exercise its discretion whether to impose or strike the prior serious felony enhancements pursuant to section 667, subdivision (a), and to address the gang allegations as to counts 3 and 4.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

STONE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.